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Supreme Court of the United States

OCTOBER TERM, 19~~60~~ 61

No. ~~665~~ 41

A. L. MECHLING BARGE LINES INC., ET AL.,
APPELLANTS,

vs.

UNITED STATES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

FILED JANUARY 21, 1961
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 667

A. L. MECHLING BARGE LINES INC., ET AL.,
APPELLANTS,

vs.

UNITED STATES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

INDEX

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

Civil Action No. 59 C 335(3)

CARGILL, INCORPORATED, a corporation, A. L. MECHLING BARGE LINES INC., a corporation, MISSISSIPPI VALLEY BARGE LINE COMPANY, a corporation, THE OHIO RIVER COMPANY, a corporation, and BLASKE, INC., a corporation, Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

COMPLAINT—Filed November 16, 1959

1. This action is brought under the provisions of 28 U.S.C., §§ 1336, 1398, 2284 and 2321-2325, and 5 U.S.C. § 1009, inclusive, to enjoin, set aside, annul and suspend a certain order of the Interstate Commerce Commission, hereinafter called the Commission, entitled Fourth Section Order No. 19059, Grain and Grain Products from Illinois to the East, made and entered by the Commission, Division 2, on January 9, 1959, as amended by Supplemental Fourth Section Order No. 19059, entered July 17, 1959, Second Supplemental Fourth Section Order No. 19059, entered August 7, 1959, and Third Supplemental Fourth Section Order No. 19059, entered September 10, 1959, copies of which are attached hereto as Exhibits 1, 2, 3, and 4, respectively, and made a part hereof, and also under the provisions of 28 U.S.C., § 2201 and 5 U.S.C., § 1009 for a declaratory judgment to settle important questions relating to the power of the Commission to relieve carriers from the long-[fol. 2] and-short-haul provision of section 4 of the Interstate Commerce Act, 49 U.S.C. § 4, hereinafter called the Act.

2. Plaintiff, Cargill, Incorporated, hereinafter called Cargill, is a corporation organized under the laws of the

State of Delaware, having its principal place of business at Minneapolis, Minnesota. It is engaged in buying, selling, storing, handling and processing corn, oats, soybeans, and other agricultural commodities. It operates a large terminal grain elevator at Chicago, Illinois, into which it draws corn, oats, and soybeans and other agricultural commodities from the grain-producing territory of the Midwest, including the territory in Northern Illinois here involved, sometimes referred to herein as the origin territory, and from which it reships such commodities by railroad, barge, truck and lake steamer to millers, processors and consumers. It also operates what are known as sub-terminal elevators located on the Illinois Waterway at Lockport, Morris, Ottawa and Spring Valley, Illinois, which purchase grain from nearby country elevators in the origin territory here involved, primarily for shipment to its terminal elevator at Chicago.

3. Plaintiff, A. L. Mechling Barge Lines Inc., hereinafter called Mechling, is a corporation organized under the laws of the State of Delaware, having its principal place of business at Joliet, Illinois. It is a common carrier by water in interstate commerce and in intrastate commerce within the State of Illinois, and it holds a certificate of public convenience and necessity under Part III of the Interstate Commerce Act, 49 U.S.C. § 901 ff.

4. Plaintiff, Mississippi Valley Barge Line Company, hereinafter called Valley, is a corporation organized under the laws of the State of Delaware, having its principal [fol. 3] place of business at St. Louis, Missouri. It is a common carrier by water in interstate commerce and in intrastate commerce within the State of Illinois, and it holds a certificate of public convenience and necessity under Part III of the Interstate Commerce Act.

5. Plaintiff, The Ohio River Company, hereinafter called Ohio River, is a corporation organized under the laws of the State of West Virginia, having its principal place of business at Cincinnati, Ohio. It is a common carrier by water in interstate commerce and in intrastate commerce within the State of Illinois, and it holds a certificate of public convenience and necessity under Part III of the Interstate Commerce Act.

6. Plaintiff, Blaske, Inc., hereinafter called Blaske, is a corporation organized under the laws of the State of Delaware, having its principal place of business at Jeffersonville, Indiana. It is a common carrier by water in interstate commerce and in intrastate commerce within the State of Illinois, and it holds a certificate of public convenience and necessity under Part III of the Interstate Commerce Act.

7. Plaintiffs Mechling, Valley, Ohio River, and Blaske are, and have been, engaged, among other things, in the transportation of corn, oats, soybeans, and other grain from all ports on the Illinois Waterway between Lockport and Lacon, Illinois, to Chicago, Illinois, with respect to which traffic they are competing carriers of the railroads here involved. They are members of the Waterways Freight Bureau, an association of common-carrier barge lines, whose articles of organization have been approved by the Commission under Section 5a of the Act, 49 U.S.C. § 5b. Through their said agent, Waterways Freight Bureau, they protested the rates here involved and the granting of fourth-[fol. 4] section relief in connection therewith. In addition, plaintiff Mechling filed an individual protest against the rates and the granting of fourth-section relief.

8. Prior to January 10, 1959, the railroads serving the Northern Illinois grain-producing area, hereinafter called the Western Railroads, had in effect certain reduced rates from such origins to Chicago on corn, oats, soybeans and the products thereof, which rates were allegedly published to meet truck and barge competition on such traffic. The railroads operating east of Chicago, hereinafter called the Eastern Railroads, also had in effect from Chicago to destinations generally east of Chicago, in what are known as Central, Trunk Line, and New England territories, herein collectively referred to as the East, proportional or reshipping rates on corn, oats, soybeans and the products thereof, applicable on such commodities originating west of Chicago. The proportional or reshipping rates from Chicago to the East could be combined with the rates from the Northern Illinois origins into Chicago to form through combination rates from origins in Northern Illinois to destinations in the East. In order to avoid violations of the long-and-short-

haul provision of section 4 of the Act, the formation of such through combination rates, was subject, among other restrictions, to the restriction that the through combination could not be lower than the local rate from Chicago to the involved destination. Subject to that restriction, the grain involved could be shipped out of Chicago to the East on proportional rates from Chicago which were lower than the so-called local or flat rates from Chicago, which would apply on grain originating at Chicago, to the same destinations.

9. On or about December 4, 1958, the Eastern and Western Railroads published, in accordance with the pro- [fol. 5] visions of the Interstate Commerce Act, and filed with the Interstate Commerce Commission, certain tariffs known as Supplement 125 to TEA-ER, Agent, Tariff 245-H, ICC 4403 (Hinsch series); Supplement 59 to TEA-ER, Agent, Tariff 535-C, ICC 4499 (Hinsch series); and Supplement 31 to WTLC, Agent, Tariff 68-R, ICC A-4069 (Prueter series). These tariffs, which were published to become effective January 10, 1959, among other things, waived the requirement that the through combination rates must be no lower than the local rates from Chicago to the involved destinations, and substituted therefor the requirement that the minimum inbound rate must be 12 cents per 100 pounds. The effect of such a provision was to permit the application of combination rates from origin to final destination which were lower than the local or flat rates from Chicago to the same destination. Since such rates would be in violation of the long-and-short-haul provision of section 4 of the Act, the tariffs referred to could not lawfully be made effective unless the Commission granted relief from the long-and-short-haul provision of section 4 of the Act, which reads in pertinent part as follows:

> (1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, . . . *Provided,*

That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence:

[fol. 6] 10. On or about December 4, 1958, the rail carriers parties to the aforesaid tariffs, through their Agent, H. R. Hinsch, also filed with the Commission an application for relief from the provisions of section 4 of the Act. This application was docketed by the Commission as Fourth Section Application No. 35140, Corn and Corn Products from Illinois to the East. On or about December 26, 1958, plaintiff Cargill filed with the Commission a protest against the proposed tariffs and a petition for suspension thereof and a protest against the granting of any fourth-section relief in connection therewith. On or about December 24, 1958, a similar protest and petition for suspension was filed by plaintiff Mechling and on or about December 23, 1958, a similar protest and petition for suspension was filed by Waterways Freight Bureau. In all these protests and petitions for suspension it was alleged, and supported with pertinent factual data, that the rates proposed by the rail carriers were lower than necessary to meet the alleged water competition and that such rates threatened the extinction of legitimate competition by water. Such allegations, if sustained, would require the denial of the relief sought since, in order to grant such relief, the Commission is required to find that the rates proposed would be "reasonably compensatory" and such term has, through long-established administrative practice, been given the meaning

set forth by the Commission in *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71, as follows:

> In the light of these and similar considerations, we are of opinion and find that in the administration of the fourth section the words "reasonably compensatory" imply that a rate properly so described must (1) cover and more than cover the extra or additional expenses incurred in handling the traffic to which it applies; (2) be no lower than necessary to meet existing competition; (3) not be so low as to threaten the extinction of legitimate competition by water carriers; and (4) not impose an undue burden on other traffic or jeopardize the appropriate return on the value of [fol. 7] carrier property generally, as contemplated in section 15a of the act.

A reply to these protests was filed by the railroads.

11. On January 9, 1959, Division 2 of the Commission voted not to suspend the proposed rates but entered an order instituting an investigation into the lawfulness thereof in Docket No. 32790. Corn, Oats, Soybeans—Illinois to the East, a copy of which order is attached hereto as Exhibit 5, and made a part hereof. That order read in part as follows:

> *It appearing*, That, upon consideration of the tariff schedules, and protests thereto, there is reason to institute an investigation to determine whether they result in rates and charges, rules or regulations and practices that are unjust and unreasonable in violation of the Interstate Commerce Act; and good cause appearing therefor:
>
> *It is ordered*, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges, rules, regulations, and practices contained in said schedules, with a view to making such findings and orders in the premises as the facts and circumstances shall warrant.
>
> *It is further ordered*, That the investigation in this proceeding shall not be confined to the matters and

issued hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said rates, charges, rules, regulations and practices under the Interstate Commerce Act.

* * * * * * *

And it is further ordered. That this matter be assigned for hearing at a time and place to be hereafter fixed.

12. Also on January 9, 1959, the Commission, by Division 2, entered the order herein complained of, Fourth Section Order No. 19059, Exhibit 1 hereto, authorizing the railroads to establish the rates sought without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act "until the effective date of the further order to be entered after hearing in fourth-section application No. 35140, as amended".

13. On or about January 28, 1959, Cargill Mechling, [fol. 8] and the Waterways Freight Bureau filed with the Commission their petitions for reconsideration and vacation of Fourth Section Order No. 19059, entered by Division 2 on January 9, 1959. The railroads filed with the Commission a reply to the said petitions, and, by order dated March 10, 1959, the Commission by Division 2, denied the aforesaid petitions for reconsideration and vacation. A copy of this order is attached hereto as Exhibit 6 and made a part hereof.

14. The proceedings in Docket No. 32790 and Fourth Section Application No. 35140 were finally heard at Chicago, Illinois, before an Examiner of the Commission, commencing July 7, 1959, and ending July 16, 1959.

15. On or about September 1, 1959, the railroad respondents and applicants in Docket No. 32790 and Fourth Section Application No. 35140 filed with the Commission a petition for further hearing in said proceedings and for consolidation with said proceedings of Fourth Section Applications No. 35507 and No. 35623.

Fourth Section Application No. 35507, which had been filed on or about June 15, 1959, was an application by the

railroads for relief from the long-and-short-haul provision of section 4 of the Act in connection with rates on corn, oats and soybeans to Chicago, Illinois, on traffic destined to the East from territory (including the so-called Kankakee Belt line of the New York Central Railroad) lying generally to the south of the origin territory involved in Fourth Section Application No. 35140. The applicants in that application had requested that the proceeding be assigned for hearing on July 7, 1959, along with the hearing in Fourth Section Application No. 35140. However, the rates sought to be established were published to become effective July 18, 1959. Cargill, Mechling, and Waterways Freight Bureau [fol. 9] filed protests against such rates and the granting of fourth-section relief in connection therewith but agreed that the hearing in connection therewith might be held on July 7, 1959, on the same record as the hearing on Fourth Section Application No. 35140. The Commission did not assign the proceeding for hearing at that time, nor has the proceeding yet been assigned for hearing. The Commission permitted the proposed rates to become effective July 18, 1959, but entered an order instituting an investigation into their lawfulness in Docket No. 33132, a copy of which is attached hereto as Exhibit 7, and made a part hereof. By Supplemental Fourth Section Order No. 19059, dated July 17, 1959, (Exhibit 2), the Commission, by Division 2, granted temporary fourth-section relief as sought in Fourth Section Application No. 35507.

Fourth Section Application No. 35623, Grain and Grain Products from Illinois to East, filed on or about August 8, 1959, was an application by the New York Central Railroad for relief from the long-and-short-haul provision of section 4 of the Act from certain points previously named in Fourth Section Application No. 35507. Fourth Section Application No. 35623 was necessitated by the fact that Fourth Section Application No. 35507 had erroneously requested relief for the wrong rates insofar as the New York Central Railroad was concerned. Such rates, and the granting of fourth-section relief in connection therewith, were protested by Cargill, Mechling, and Waterways Freight Bureau but the Commission allowed them to become effective September 15, 1959, and in connection therewith granted temporary fourth-

section relief in Third Supplemental Fourth Section Order No. 19059, entered September 10, 1959. (Exhibit 4). The rates involved are embraced within the investigation in No. 33132.

[fol. 10] Prior to the filing of Fourth Section Application No. 35623, the railroads had also filed Fourth Section Application No. 35559, Grain and Grain Products From Illinois to the East, in which they sought relief from the long-and-short-haul provision of section 4 of the Act with respect to the rates on corn, oats and soybeans from additional territory in Northern Illinois and in Wisconsin to Chicago, Illinois, and Milwaukee, Wisconsin, for further movement to the East. The proposed rates were permitted by the Commission to become effective on August 8, 1959, as published, subject to temporary fourth-section relief granted by Second Supplemental Fourth Section Order No. 19059, dated August 7, 1959, (Exhibit 3). The Commission also instituted an investigation into the lawfulness of said rates by its First Supplemental Order No. 33132, Grain and Soybeans—Illinois to the East, a copy of which is attached hereto as Exhibit 8, and made a part hereof.

Replies opposing the further hearing requested by the railroads in No. 32790 and Fourth Section Application No. 35140 and consolidation with those proceedings of Fourth Section Applications No. 35507 and No. 35623 were filed by Cargill, Mechling, and Waterways Freight Bureau. Before the Commission had acted on the petition, the railroad respondents and applicants filed a supplementary petition for further hearing in No. 32790 and Fourth Section Application No. 35140, in which they sought the opportunity to introduce evidence relating to the barge movements of corn to Chicago for the months of July and August, 1959, although the hearing in the proceeding had just concluded on July 16, 1959. Replies opposing the further hearing and protesting against the unreasonable delay which the further hearing and consolidation would necessarily cause were filed by Cargill, Mechling and Waterways Freight [fol. 11] Bureau. However, by order dated October 28, 1959, released to the parties and the public on November 4, 1959, the Commission, by Division 2, reopened No. 32790 and Fourth Section Application No. 35140 for further hear-

ing and also ordered that No. 33132 and Fourth Section Applications Nos. 35507, 35623, and 35559 be consolidated with No. 32790 and Fourth Section Application No. 35140 for hearing. A copy of said order is attached hereto as Exhibit 9, and made a part hereof. No date for the further hearing has yet been set.

16. Although Fourth Section Application No. 35140 was filed on or about December 4, 1958, and the rates in connection with which fourth-section relief was sought became effective January 10, 1959, the hearing in the proceeding was not concluded until July 16, 1959, and briefs had not yet been filed when the Commission, by its order of October 28, 1959, reopened the proceeding for further hearing. Thus, the railroads have already been able to maintain for ten months the rates which plaintiffs allege are unlawful. If Fourth Section Application No. 35140 had not been reopened for further hearing, under the normal Commission procedure, it would have been in excess of one more year before the proceedings would have been determined by the Commission. The reopening of Fourth Section Application No. 35140 will add to that time several additional months, during all of which the railroads will be able to maintain the rates alleged to be unlawful, unless the operation of Fourth Section Order No. 19059, as amended, is enjoined by the Court.

17. The effect of the rates maintained by the railroads pursuant to Fourth Section Order No. 19059, as amended, has been and will continue to be, to deprive plaintiff Cargill and the plaintiff water carriers, Mechling, Valley, Ohio River, and Blaske, of business to Chicago which they would [fol. 12] normally handle if the Commission had not unlawfully permitted the railroads to establish such rates, diverting such business to competitors of plaintiffs and causing plaintiffs substantial and irreparable injury.

18. The Commission's Fourth Section Order No. 19059, dated January 9, 1959, as amended (Exhibits 1, 2, 3 and 4 hereto), is void and unlawful for the following reasons:

(1) The order is not supported by adequate findings and does not show on its face sufficient basis for its

issuance; and more particularly it does not contain findings to show that the facts relied on by the railroads constitute a "special case," that the order was entered "after investigation", or that the rates which it authorizes are "reasonably compensatory" for the service performed, as that term has been defined through long and well-established administrative practice.

(2) The Commission is without power and authority to enter an order granting "temporary" fourth-section relief in said proceeding prior to completion of its investigation and hearing.

(3) The order was entered by the Commission without giving plaintiffs an opportunity to be heard and to present evidence in support of their protests in a matter vitally affecting their business interests and without conducting a hearing to determine the correctness of the allegations made in the various applications, petitions, and protests filed in said proceedings.

(4) The order deprives plaintiffs of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(5) The order is capricious, arbitrary, erroneous and beyond the power of the Commission.

[fol. 13] 19. Although the weight of authority in cases decided by Three-Judge District Courts is now clearly to the effect that orders granting relief from the long-and-short-haul provision of section 4 of the Act must be supported by findings to show a sufficient basis for issuance of the order, the Commission, as here, still follows the practice of entering such orders without supporting findings. It is of substantial importance to these plaintiffs as well as to many other competing carriers and shippers who find themselves in similar positions, and who wish to avoid lengthy and expensive litigation, that the absence of any power and authority in the Commission to enter temporary fourth-section orders prior to a hearing, and to enter them without supporting findings, be definitely established. It is

possible that the entry of a final order in Fourth Section Application No. 35140 may make this case moot before a final determination of these issues by the Supreme Court of the United States can be obtained, just as other cases in which similar relief has been sought have become moot before the issues could be determined by the Supreme Court. Therefore, it is important to the proper administration of the Act that the Court, in addition to passing upon the legality of the particular Commission action here under review, enter a declaratory judgment defining the rights, powers, and duties of the Commission in entering so-called temporary orders granting relief from the long-and-short-haul provision of section 4 of the Act prior to a hearing, and in entering such orders without supporting findings.

20. By reason of the unlawful, arbitrary and capricious action of the Commission in entering its Fourth Section Order No. 19059, dated January 9, 1959, as amended, plaintiffs have been and will continue to be subjected to irreparable damage if the relief hereinafter prayed for is not granted.

[fol. 14] Wherefore, plaintiffs pray:

1. That, pursuant to 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325, inclusive, there shall be constituted to hear this case a special court of three judges, at least one of whom shall be a circuit judge;

2. That the Court, by interlocutory injunction, enjoin and restrain the operation of Fourth Section Order No. 19059, as amended, (Exhibits 1, 2, 3 and 4) pending final hearing and determination of this suit;

3. That, upon final hearing of this cause, the Court adjudge that Fourth Section Order No. 19059, dated January 9, 1959, as amended, (Exhibits 1, 2, 3 and 4), is unlawful, void, beyond the power of the Commission, arbitrary, capricious and unsupported by essential findings, and that a judgment be entered setting aside, annuling, suspending and perpetually enjoining the operation of said order;

4. That the Court, pursuant to the provisions of 28 U.S.C. § 2201 and 5 U.S.C. § 1009 enter a declaratory judgment upon the following questions of law:

(1) May the Interstate Commerce Commission enter an order granting relief from the long-and-short-haul provision of section 4 of the Interstate Commerce Act, 49 U.S.C. § 4, which order does not contain findings which disclose on the face of the order a basis for its issuance sufficient to comply with the requirements of section 4 of the Act.

(2) May the Commission, concurrently with the entry of an order instituting an investigation into the lawfulness of rates which would be in violation of section 4 of the Act unless the Commission authorizes such fourth-section departures, and prior to the hearing therein ordered, also enter, over the protests of injured [fol. 15] competing carriers and shippers, a so-called temporary order, granting relief from the long-and-short-haul provision of section 4 of the Act, to be effective until the effective date of a further order to be entered by the Commission after the hearing?

5. That plaintiffs have such other and further relief as may be deemed proper by the Court.

William G. Guerri, J. Richard Skouby, 705 Olive Street, St. Louis, Missouri, Phone: CEntral 1-0545, Attorneys for Plaintiffs.

Thompson Mitchell Thompson & Douglas, 705 Olive Street, St. Louis, Missouri, Of Counsel.

S. D. Timmons, 200 Grain Exchange, Minneapolis 15, Minnesota; Harold E. Spencer, One N. LaSalle Street, Chicago 2, Illinois, Attorneys for Plaintiff, Cargill, Incorporated.

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Edward B. Hayes, Wilbur S. Legg, 135 S. LaSalle Street, Chicago 3, Illinois, Attorneys for Plaintiffs, A. L. Mechling Barge Lines, Inc., Mississippi Valley Barge Line Company, The Ohio River Company, Blaske, Inc.

Lord, Bissell & Brook, 135 S. LaSalle Street, Chicago 3, Illinois, Of Counsel.

[fol. 16]

EXHIBIT 1 TO COMPLAINT

Fourth Section Order No. 19059

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 9th day of January, A. D. 1959

GRAIN AND GRAIN PRODUCTS FROM ILLINOIS TO THE EAST

Upon consideration of the matters and things involved in fourth-section application No. 35140, as amended, filed by the Traffic Executive Association—Eastern Railroads, Agent, for and on behalf of carriers parties to its tariff I.C.C. 4403 (Hinsch series) and other tariffs named in the application, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, which application, as amended, is hereby referred to and made a part hereof:

It is ordered, That, effective January 10, 1959, and until the effective date of the further order to be entered after hearing in fourth-section application No. 35140, as amended, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed direct routes, for the transportation of corn, oats, soybeans, and their

products, in carloads, as described in the application, from points in northern Illinois named in Appendix "C" of the application to points in central, trunk-line, and New England territories, rates constructed on the basis described in the application, as amended, and to maintain higher rates from and to intermediate points; *Provided*, That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Division 2.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 17]

EXHIBIT 2 TO COMPLAINT

Supplemental Fourth Section Order No. 19059

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 17th day of July, A. D. 1959.

GRAIN AND GRAIN PRODUCTS FROM ILLINOIS TO THE EAST

Upon consideration of the matters and things involved in fourth-section application No. 35507, filed by the Traffic Executive Association-Eastern Railroads, Agent, for and on behalf of carriers parties to its tariff I.C.C. 4403 (Hinsch series) and other tariffs named in the application, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, and upon further consid-

eration of fourth-section order No. 19059, entered January 9, 1959, in fourth-section application No. 35140, as amended, which applications and order are hereby referred to and made a part hereof:

It is ordered, That fourth-section order No. 19059, entered as aforestated, be, and it is hereby, modified and amended by adding thereto the following paragraph:

> *It is further ordered*, That, effective July 18, 1959, and until the effective date of the further order to be entered after hearing in fourth-section application No. 35507, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed direct routes, for the transportation of corn, oats, and soybeans, and their products, in carloads, as more fully described in the application, from points in northern Illinois to points in central, trunk-line, and New England territories, all as named or described in the application, rates constructed on the basis described in the application, and to maintain higher rates from and to intermediate points; *Provided*, That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, division 2,

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 18]

EXHIBIT 3 TO COMPLAINT

Second Supplemental Fourth Section Order No. 19059

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Fourth Section Board, held at its office in Washington, D.C., on the 7th day of August, A.D. 1959.

GRAIN AND GRAIN PRODUCTS FROM ILLINOIS TO THE EAST

(From Wisconsin)

Upon consideration of the matters and things involved in fourth-section application No. 35559, filed by the Traffic Executive Association-Eastern Railroads, Agent, for and on behalf of carriers parties to its tariff I.C.C. 4403 and other tariffs named in the application, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, and upon further consideration of fourth-section order No. 19059, entered January 9, 1959, in fourth-section application No. 35140, as amended, as modified and amended by supplemental order No. 19059, entered July 17, 1959, in application No. 35507, which applications, and order as amended are hereby referred to and made a part hereof:

It is ordered, That fourth-section order No. 19059, entered, modified, and amended as aforestated, be, and it is hereby, further modified and amended by adding thereto the following paragraph:

It is further ordered, That, effective August 18, 1959, and until the effective date of the further order to be entered after hearing in fourth-section application No. 35559, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed direct routes, for the transportation of corn, oats, soybeans, and their products, in carloads, as more fully described in the application, to points in central, trunk

line, and New England territories, from (A) points in Illinois and Wisconsin, when routed by way of Chicago, Ill., or points in the Chicago switching district, Kewaunee, and Milwaukee, Wis., or Milwaukee terminal stations, all as named or described in the application, rates constructed on the basis described in the application, and to maintain higher rates from and to intermediate points; *Provided,* That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Fourth Section Board.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 19]

EXHIBIT 4 TO COMPLAINT

Third Supplemental Fourth Section Order No. 19059

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Fourth Section Board, held at its office in Washington, D.C., on the 10th day of September, A. D. 1959.

GRAIN AND GRAIN PRODUCTS FROM ILLINOIS TO THE EAST

Upon consideration of the matters and things involved in fourth-section application No. 35623, filed by The New York Central Railroad Company for itself and on behalf of carriers parties to its tariff I.C.C. 1169, according as they may participate in the traffic, for authority to establish and

maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, and upon further consideration of fourth-section order No. 19059, entered January 9, 1959, in fourth-section application No. 35140, as amended, as modified and amended by supplemental orders entered in other applications from time to time, which applications, and order as amended are hereby referred to and made a part hereof:

It is ordered, That fourth-section order No. 19059, entered, modified, and amended as aforestated, be, and it is hereby, further modified and amended by adding thereto the following paragraph:

> *It is further ordered*, That, effective September 15, 1959, and until the effective date of the further order to be entered after hearing in fourth-section application No. 35623, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed direct routes, for the transportation of corn, oats, soybeans, and their products, in carloads, as more fully described in the application, from points in Illinois on The New York Central Railroad Company to points in central, trunk line, and New England territories, all as named or described in the application, rates constructed on the basis described in the application, and to maintain higher rates from and to intermediate points; *Provided*, That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Fourth Section Board.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 20]

EXHIBIT 5 TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 9th day of January, A. D. 1959.

No. 32790

CORN, OATS, SOYBEANS—ILLINOIS TO THE EAST

There being under consideration the matter of rates and charges, and the rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce of corn, oats, soybeans, and their products, in carloads, from certain points in northern Illinois to official territory points east of Chicago, as set forth in the following:

Traffic Executive Association-Eastern Railroads, Agent:

SUPPLEMENT 125 to I.C.C. 4403 (Hinsch Series), On pages 4, 5, and 6 thereof, Note 20, Items 278-P and 281;

Western Trunk Line Committee, Agent:

SUPPLEMENT 31 TO I.C.C. A-4069,
On pages 7 and 8 thereof, Items 125-G and 126;

JOINT TARIFF:

Traffic Executive Association-Eastern Railroads, Agent:

I.C.C. 4499 (Hinsch Series),

Western Trunk Line Committee, Agent,

I.C.C. A-3941,
SUPPLEMENT 59 thereto, on pages 4, 5, 6, 7, and 8 thereof, Note 45, Items 536 and 537,

SUPPLEMENT 60 thereto, on page 2 thereof, Item 536-A;

or as same may be amended or reissued;

It appearing, That, upon consideration of the tariff schedules, and protests thereto, there is reason to institute an investigation to determine whether they result in rates and charges, rules or regulations and practices that are unjust and unreasonable in violation of the Interstate Commerce Act; and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges, rules, regulations, and practices contained in said schedules, with a view to making such findings and orders in the premises as the facts and circumstances shall warrant.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said rates, charges, rules, regulations and practices under the Interstate Commerce Act.

It is further ordered, That the carriers parties to the schedules named herein be, and they are hereby, made respondents to this proceeding; that a copy of this order be served upon the said respondents; and that a notice of this proceeding be given the public by posting a copy of this order in the Office of the Secretary of the Commission.

[fol. 21] *And it is further ordered*, That this matter be assigned for hearing at a time and place to be hereafter fixed.

By the Commission, Division 2.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 22]

EXHIBIT 6 TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 10th day of March, A. D. 1959.

GRAIN AND GRAIN PRODUCTS FROM ILLINOIS TO THE EAST

Upon further consideration of the matters and things involved in fourth-section application No. 35140, as amended, and upon consideration of petitions dated January 26, 1959, and January 27, 1959, filed by Mechling Barge Lines, Inc., and Cargill, Incorporated, respectively, for reconsideration of application No. 35140, as amended, and vacation of fourth-section order No. 19059, entered therein, which application as amended, petitions, and order are hereby referred to and made a part hereof, and it appearing that the matters and things submitted in the petitions do not justify the vacation sought:

It is ordered, That the petitions of January 26, 1959, and January 27, 1959, be, and they are hereby, denied.

By the Commission, Division 2.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 23]

EXHIBIT 7 TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 17th day of July, A. D. 1959.

No. 33132

GRAIN AND SOYBEANS—ILLINOIS TO THE EAST

There being under consideration the matter of rates and charges, and the rules, regulations and practices affecting

such rates and charges, applicable on interstate or foreign commerce of corn, oats, soybeans, and their products, in carloads, from certain points in northern Illinois to official territory points east of Chicago, Ill., as set forth in the following:

Traffic Executive Association-Eastern Railroads, Agent:

SUPPLEMENT 136 To I.C.C. 4403 (Hinsch series), On page 2 thereof, in Item 278-Q, the STATIONS preceded by the "tear drop" reduction symbol.

SUPPLEMENT 137 To I.C.C. 4403 (Hinsch series), On page 2 thereof, in Item 281-B, the STATIONS preceded by the "tear drop" reduction symbol.

Western Trunk Line Committee, Agent:

SUPPLEMENT 36 TO I.C.C. A-4069,
On page 3 thereof, in Item 125-H, the stations preceded by the "tear drop" reduction symbol and the stations where the "tear drop" reduction symbol precedes the carriers name.

SUPPLEMENT 37 TO I.C.C. A-4069,
On pages 2 and 3 in ITEM 126-B, the stations preceded by the "tear drop" reduction symbol and the stations where the "tear drop" reduction symbol precedes the carriers name.

JOINT TARIFF:

Traffic Executive Association-Eastern Railroads, Agent:

I.C.C. 4499 (Hinsch series)

Western Trunk Line Committee, Agent,

I.C.C. A-3941,

SUPPLEMENT 65 thereto, on page 2 thereof, in Item 536-C, the STATIONS preceded by the "tear drop" reduction symbol.

SUPPLEMENT 67 thereto, on page 2 thereof, in Item 537-C, the STATIONS preceded by the "tear drop" reduction symbol.

or as same may be amended or reissued;

It appearing, That, upon consideration of the tariff schedules, and protests thereto, there is reason to institute an investigation to determine whether they result in rates and charges, rules or regulations and practices that are unjust and unreasonable in violation of the Interstate Commerce Act; and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges, rules, regulations, and practices contained in said schedules, with a view to making such findings and orders in the premises as the facts and circumstances shall warrant.

[fol. 24] *It is further ordered*, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said rates, charges, rules, regulations and practices under the Interstate Commerce Act.

It is further ordered, That the carriers parties to the schedules named herein be, and they are hereby, made respondents to this proceeding; that a copy of this order be served upon the said respondents; and that a notice of this proceeding be given the public by posting a copy of this order in the Office of the Secretary of the Commission.

And it is further ordered, That this matter be assigned for hearing at a time and place to be hereafter fixed.

By the Commission, Division 2.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 25]

EXHIBIT 8 TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Board of Suspension, held at its office in Washington, D.C., on the 14th day of August, A. D. 1959.

No. 33132

FIRST SUPPLEMENTAL ORDER

GRAIN AND SOYBEANS—ILLINOIS TO THE EAST

In the original order in this proceeding, the Commission, Division 2, entered upon an investigation concerning certain rates and charges, and the rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce of corn, oats, sorghum grains and soybeans, and products thereof, in carloads, from points in northern Illinois to points in official territory east of Chicago, Ill., as set forth in schedules designated therein;

It appearing, That the following schedules contain rates and charges, rules, regulations and practices which are similar to those covered by the original order in this proceeding:

Traffic Executive Association-Eastern Railroads, Agent:

SUPPLEMENT 138 TO I.C.C. 4403 (Hinsch series), On page 8 thereof, in Item 281-C, all matter preceded by the "tear drop" reduction symbol.

SUPPLEMENT 140 TO I.C.C. 4403 (Hinsch series) On pages 2 and 3 thereof, in Item 278-S, all matter preceded by the "tear drop" reduction symbol.

SUPPLEMENT 1 TO I.C.C. C-64,
On pages 3 and 4 thereof, ITEMS 260 and 265;

Western Trunk Line Committee, Agent:

SUPPLEMENT 38 TO I.C.C. A-4069,

On pages 2 and 3 thereof, in Items 125-I and 126-C, the point Milwaukee, Wis., preceded by the "tear drop" reduction symbol.

JOINT TARIFF:

Traffic Executive Association-Eastern Railroads, Agent:

I.C.C. 4499 (Hinsch series)

Western Trunk Line Committee, AGENT,

I.C.C. A-3941,

In SUPPLEMENT 68, on pages 2 and 3 thereof, in Items 536-D and 537-D, all matter preceded by the "tear drop" reduction symbol;

It further appearing, That upon consideration of the tariff schedules shown in the foregoing, there is reason to institute an investigation to determine whether they result in rates and charges, rules or regulations and practices that are unjust and unreasonable in violation of the Interstate Commerce Act; and good cause appearing therefor:

It is ordered, That this investigation be, and it is hereby broadened, upon the Commission's own motion, into and concerning the lawfulness of the rates, charges, rules, regulations and practices contained in schedules designated herein, or as the same may be amended or reissued, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

[fol. 26] *It is further ordered,* That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said rates, charges, rules, regulations and practices under the Interstate Commerce Act.

It is further ordered, That the carriers parties to the schedules named herein be, and they are hereby, made respondents to this proceeding; that a copy of this order be served upon the said respondents; and that a notice of this

proceeding be given the public by posting a copy of this order in the Office of the Secretary of the Commission.

And it is further ordered, That this matter be assigned for hearing at a time and place to be hereafter fixed.

By the Commission, Board of Suspension.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 27]

EXHIBIT 9 TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 28th day of October, A. D. 1959.

No. 32790

CORN, OATS, SOYBEANS—ILLINOIS TO THE EAST

FOURTH SECTION APPLICATION No. 35140
GRAIN AND GRAIN PRODUCTS FROM ILLINOIS
TO THE EAST

No. 33132

GRAIN AND SOYBEANS—ILLINOIS TO THE EAST

FOURTH SECTION APPLICATION No. 35507
GRAIN AND GRAIN PRODUCTS FROM ILLINOIS
TO THE EAST

FOURTH SECTION APPLICATION No. 35623
GRAIN AND GRAIN PRODUCTS FROM ILLINOIS
TO THE EAST

FOURTH SECTION APPLICATION No. 35559
GRAIN AND GRAIN PRODUCTS FROM ILLINOIS
TO THE EAST

Upon consideration of the records in the above-entitled proceedings, of a petition, dated September 1, 1959, and

supplemental petition, dated September 18, 1959, filed by the applicants and respondents for further hearing in Docket No. 32790 and Fourth Section Application No. 35140 and consolidation therewith of Fourth Section Applications Nos. 35507 and 35623, and of the replies thereto filed by Cargill, Incorporated, A. L. Mechling Barge Lines, Inc., Waterways Freight Bureau, and Peoria Board of Trade, and good cause appearing:

It is ordered, That No. 32790 and F. S. A. 35140 be, and the same are hereby, reopened for further hearing.

It is further ordered, That No. 33132, F. S. A. 35507, F. S. A. 35623, and F. S. A. 35559 be, and the same are hereby, consolidated with No. 32790 and F. S. A. 35140 for hearing.

By the Commission, Division 2.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 29]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

[Title omitted]

ANSWER OF UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION—Filed January 18, 1960

Now come the United States of America and the Interstate Commerce Commission, defendants, and, in answer to the complaint, state:

First Defense

The complaint fails to state a cause of action.

Second Defense

Plaintiffs may not maintain this suit for failure to exhaust their administrative remedies.

Third Defense

Plaintiffs cannot maintain this suit for lack of standing.

[fol. 30] Fourth Defense

That the complaint be dismissed with respect to the request for a declaratory judgment for the reason that the Court does not have jurisdiction to grant relief by way of declaratory judgment against the defendants.

Fifth Defense

Further answering the complaint but without waiver of their defenses hereinabove, the defendants answer and say:

I.

Answering paragraph 1, defendants admit that this action is brought purportedly pursuant to the statutes mentioned therein, except that the defendants aver that these statutes do not confer upon the Court jurisdiction to review interlocutory orders of the Commission or to grant the relief sought by way of declaratory judgment.

II.

Admit the allegations contained in paragraphs 2, 3, 4, 5 and 6, except that defendants allege that the plaintiffs named in paragraphs 4, 5 and 6 did not participate in the proceedings before the Commission.

III.

Answering paragraph 7, defendants admit that the rate-making agreement of Waterways Freight Bureau has been approved by the Commission under Section 5a of the Interstate Commerce Act, 49 U.S.C. Section 5b, that it protested the rates filed by the rail carriers and the Commission's grant of temporary relief from the long and short-haul provisions of Section 4 of the Interstate Commerce Act, 49 U.S.C. Section 4, pending hearing; and admit the filing of a protest with the Commission by plaintiff Mechling against [fol. 31] the rates and the granting of fourth section relief.

Defendants neither admit nor deny the remaining allegations contained in this paragraph for lack of knowledge and information.

IV.

Answering paragraph 8, the Commission has as yet made no findings with respect to these allegations, and for lack of knowledge defendants neither admit nor deny the allegations.

V.

Answering paragraph 9, defendants admit the allegations contained therein.

VI.

Answering paragraph 10, admit the allegations to the effect that the rail carriers, on or about December 4, 1958, filed an application for fourth section relief which was docketed by the Commission as described therein, admit the filing of the designated pleadings by the named plaintiffs and the rail carriers, except that defendants aver that the remaining allegations of this paragraph are argumentative in nature to which no answer is required.

VII.

Admit the allegations of paragraphs 11, 12, 13 and 14, except that defendants aver that the hearing before a Commission examiner, as stated in paragraph 14, did not constitute a final hearing foreclosing the possibility of reopening for further hearing.

VIII.

Answering the allegations of paragraph 15, defendants admit filing of the designated pleadings and fourth section applications with the Commission, except that defendants [fol. 32] respectfully refer the Court to the fourth section applications Nos. 35507, 35623 and 35559 for a complete and accurate statement of the matters contained therein; admit the entry of the designated orders of the Commission. Defendants aver that the Commission has set the matter

down for further hearing before an examiner at Chicago, Illinois, on February 1, 1960.

IX.

Answering paragraph 16, defendants aver that the allegations contained therein are argumentative in nature and require no answer.

X.

Answering paragraph 17, defendants deny that the Commission unlawfully permitted the establishment of the challenged rates. Defendants aver that the action of the Commission is valid and lawful in all respects. Defendants further aver that any injuries which may have occurred or will occur to plaintiffs as a result of the lawful and valid action of the Commission do not constitute any legal basis for instituting or maintaining this suit.

XI.

Deny that the designated orders of the Commission are void and unlawful for the reasons specified in paragraph 18 or for any reasons whatsoever.

XII.

Answering the allegations of paragraph 19, the defendants aver that they are argumentative in nature and do not require an answer, and in any case do not afford a basis for the granting of a declaratory judgment. The defendants further aver that the Court is without jurisdiction to render a declaratory judgment.

[fol. 33] XIII.

Answering paragraph 20, defendants deny that the action of the Commission in entering its fourth section order No. 19059, dated January 9, 1959, as amended, is unlawful, arbitrary and capricious. Defendants aver that fourth section order No. 19059, as amended, and any and all other orders of the Commission entered in this proceeding are lawful and valid in all respects and that any injuries which may occur to the plaintiffs resulting from the lawful and

valid orders of the Commission do not constitute any legal basis for instituting or maintaining this cause. Further answering the complaint, defendants aver that plaintiffs have not shown any legal damage to require the issuance of an interlocutory injunction pending determination by this Court of this suit.

Wherefore, the United States of America and the Interstate Commerce Commission pray that the relief sought in the complaint against the United States and the Interstate Commerce Commission be denied, and that the complaint be dismissed against these defendants, plaintiffs to pay the costs.

Robert W. Ginnane, General Counsel; H. Neil Garson, Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Interstate Commerce Commission.

Robert A. Bicks, Acting Assistant Attorney General; Harry Richards, United States Attorney, St. Louis, Missouri; John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C., Attorneys for the United States of America.

[fol. 34] Certificate of Service (omitted in printing).

[fol. 35]

In the United States District Court

For the Eastern District of Missouri

Eastern Division

[Title omitted]

Motion of Railroad Defendants for Leave to Intervene as Defendants—Filed February 3, 1960

Now come The Pennsylvania Railroad Company; Wabash Railroad Company; The Baltimore and Ohio Railroad Com-

pany; The New York Central Railroad Company; Erie Railroad Company; The Chesapeake and Ohio Railroad Company; The New York, Chicago and St. Louis Railroad Company; Grand Trunk Railway System; Atchison, Topeka and Santa Fe Railway Company; Chicago and North Western Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad; Illinois Central Railroad; Chicago, Rock Island and Pacific Railroad Company; Gulf, Mobile and Ohio Railroad; Chicago, Great Western Railway; Minneapolis, St. Paul & Sault Ste. Marie Railroad Company; and Chicago, Burlington & Quincy Railroad Company, corporations, and respectfully move this Honorable Court for leave to intervene as defendants in this action and as grounds therefor say:

1. Applicants for intervention are common carriers by railroad engaged in the transportation of property between points in Illinois and New York, and other states, and as such common carriers are subject to the provisions of the Interstate Commerce Act.

[fol. 36] 2. The above-entitled cause was instituted in this Court by the filing of a complaint on or about November 16, 1959. Said complaint seeks to have set aside the Fourth Section Order No. 19059 made and entered by the Interstate Commerce Commission, Division 2, on January 9, 1959. This order was made upon the application of your applicants for intervention herein and gave them temporary relief from the provisions of Section 4 of the Interstate Commerce Act, pending investigation of the rail rates published by your applicants for intervention in I.C.C. Docket No. 32790, *Corn, Oats, Soybeans—Illinois to the East.*

The Commission case was heard during July, 1959, but before an Examiner's Proposed Report was issued, was reopened and consolidated with the Commission's Docket No. 33132, *Grain and Soybeans—Illinois to the East*, with further hearing now pending.

3. Applicants for intervention are parties in the above-entitled Commission proceedings and have a substantial interest in the Commission's Fourth Section Order No. 19059 assailed and sought to be set aside by complainants

herein and, under statutes of the United States (28 U.S.C.A. Sec. 2323) and Rule 24 of the Federal Rules of Civil Procedure, have a right to intervene herein against said plaintiffs.

4. This petition is accompanied by applicants' proposed answer, attached hereto, and made a part hereof, which sets forth the defenses for which intervention is sought by applicants.

Wherefore, applicants for intervention pray that this Court enter an order granting them leave to intervene herein as defendants, with leave to file said proposed answer as their answer herein and for such other and further relief as to this Court may seem just.

Respectfully submitted,

Donald M. Tolmie, Room 652—Union Station, Chicago 6, Illinois; Eugene S. Davis, 1667 Railway Exchange Building, St. Louis 1, Missouri; Richard [fol. 37] J. Murphy, 1225 LaSalle Street Station, Chicago 5, Illinois; James A. Gillen and James E. Steffarud, 547 West Jackson Boulevard, Chicago 6, Illinois; Don McDevitt, LaSalle Street Station, Chicago 5, Illinois; John W. Adams, 104 St. Francis Street, Mobile 13, Alabama; James M. Souby, Jr., 80 East Jackson Boulevard, Chicago 4, Illinois.

[fol. 38]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

[Title omitted]

NOTICE OF MOTION—Filed February 3, 1960

Sirs:

Please Take Notice that upon the annexed motion of The Pennsylvania Railroad Company, Wabash Railroad Company, The Baltimore and Ohio Railroad Company, The

New York Central Railroad Company, Erie Railroad Company, The Chesapeake and Ohio Railroad Company, The New York, Chicago and St. Louis Railroad Company, Grand Trunk Railway System, Atchison, Topeka and Santa Fe Railway Company, Chicago and North Western Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad, Illinois Central Railroad, Chicago, Rock Island and Pacific Railroad Company, Gulf, Mobile and Ohio Railroad, Chicago, Great Western Railway, Minneapolis, St. Paul and Sault Ste. Marie Railroad Company, and Chicago, Burlington & Quincy Railroad Company, dated February 3, 1960, and upon all of the proceedings heretofore had herein, the undersigned will on the 26th day of February, 1960, at 9:30 a.m. of that day or as soon thereafter as counsel can be heard, respectfully move the Honorable Three Judge Court constituted and convened to hear and determine the within motion for an order granting the aforesaid applicants for intervention leave to intervene as parties defendant and granting them leave to forthwith file their answer to the complaint herein.

Respectfully,

Eugene S. Davis, Attorney for Applicants for Intervention, 1667 Railway Exchange Building, St. Louis 1, Missouri.

[fol. 39] Certificate of Service (omitted in printing).

[fol. 40]

In the United States District Court

For the Eastern District of Missouri

Eastern Division

[Title omitted]

Proposed Answer of Intervening Defendants—Filed February 26, 1960

Now come The Pennsylvania Railroad Company, Wabash Railroad Company, The Baltimore and Ohio Railroad Company, The New York Central Railroad Company, Erie

Railroad Company, The Chesapeake and Ohio Railroad Company, The New York, Chicago and St. Louis Railroad Company, Grand Trunk Railway System, Atchison, Topeka and Santa Fe Railway Company, Chicago and North Western Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad, Illinois Central Railroad, Chicago, Rock Island and Pacific Railroad Company, Gulf, Mobile and Ohio Railroad, Chicago, Great Western Railway, Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, and Chicago, Burlington & Quincy Railroad Company and for answer to the complaint filed herein respectfully allege that they are common carriers by railroad and as such are subject to the provisions of the Interstate Commerce Act. They are among the applicants in the proceedings before the Interstate Commerce Commission known as Fourth Section Applications Nos. FSA-35140, FSA-35507, FSA-35559, and FSA-35623 on the Commission's docket, in which proceedings the orders complained of were made. They have been permitted to intervene in this cause pursuant to an order of this Honorable Court.

[fol. 41] In answer to the complaint, intervening defendants say:

First Defense

The complaint fails to state a claim against the defendants upon which relief can be granted.

Second Defense

Plaintiffs may not maintain this suit for failure to exhaust their administrative remedies.

Third Defense

The complaint, with respect to the request for a declaratory judgment, should be dismissed for the reason that the Court does not have jurisdiction to grant relief by way of declaratory judgment against the defendants.

Fourth Defense

Further answering but without waiver of their defenses hereinbefore made, the intervening defendants answer and say:

I.

In answer to paragraph 1 of the complaint, intervening defendants admit that plaintiffs' action is stated to be brought pursuant to certain cited statutes of the United States, but they deny that the Court has jurisdiction under these statutes to entertain plaintiffs' action and grant relief thereon.

II.

In answer to paragraphs 2, 3, 4, 5 and 6, intervening defendants admit the allegations contained therein.

III.

In answer to paragraph 7, intervening defendants admit that the rate-making agreement of Waterways Freight Bureau has been approved by the Commission under Section 5a of the Interstate Commerce Act, 49 U.S.C. Section 5b, that it protested the rates here involved and the temporary relief from the long and short haul provisions of Section 4 of the Interstate Commerce Act, 49 U.S.C. Section 4, and the filing of a protest with the Commission by Mechling against the rates and the granting of fourth-section relief. Intervening defendants neither admit nor deny the remaining allegations contained in this paragraph [fol. 42] for lack of knowledge and information.

IV.

In answer to paragraph 8, intervening defendants admit the allegations contained therein except that the restriction that the through combination could not be lower than the local rate from Chicago to the involved destination does not apply on the grain involved arriving at Chicago by barge and that these matters are before the Commission in the involved dockets and the Commission has as yet made no findings with respect thereto.

V.

In answer to paragraph 9, intervening defendants admit the allegations contained therein.

VI.

In answer to paragraph 10, intervening defendants admit that on or about December 4, 1958, the rail carriers parties to the aforesaid tariffs filed with the Commission an application for relief from the provisions of Section 4 of the Act which application was docketed as Fourth Section Application No. 35140; and that plaintiffs Cargill and Mechling and Waterways Freight Bureau filed the designated pleadings, except that to the remaining allegations of this paragraph intervening defendants aver that they are argumentative in the nature to which no answer is required.

VII.

In answer to paragraphs 11, 12 and 13, intervening defendants admit the allegations contained therein.

VIII.

In answer to paragraph 14, intervening defendants admit that the proceedings in Docket No. 32790 and Fourth Section Application No. 35140 were heard at Chicago, Illinois, before an Examiner of the Commission, commencing July 7, 1959, and ending July 16, 1959, except that intervening defendants aver that the hearing before a Commission examiner did not constitute a final hearing foreclosing the possibility of reopening for further hearing.

IX.

In answer to paragraph 15, intervening defendants admit [fol. 43] the filing of the designated pleadings and fourth section applications with the Commission, except that intervening defendants respectfully refer the Court to the fourth section applications Nos. 35507, 35623 and 35559 for a complete and accurate statement of the matters contained therein; admit the entry of the designated orders of the Commission. Intervening defendants aver that the Commission had set the matter down for further hearing before an examiner at Chicago, Illinois, on February 1, 1960, but that at the joint request of the applicant railroads and plaintiff Cargill the hearing has been postponed indefinitely.

X.

In answer to paragraph 16, intervening defendants aver that the allegations contained therein are argumentative in nature and require no answer.

XI.

In answer to paragraph 17, intervening defendants deny the allegation contained therein. Defendants aver that the action of the Commission is valid and lawful in all respects and the results of this lawful and valid action do not constitute any legal basis for instituting or maintaining this suit.

XII.

In answer to paragraph 18, intervening defendants deny that the designated orders of the Commission are void and unlawful for the reasons specified or for any other reasons.

XIII.

In answer to paragraph 19, intervening defendants aver that the allegations contained therein are argumentative in nature and do not require an answer, and in any case do not afford a basis for a declaratory judgment. Intervening defendants further aver that the Court is without jurisdiction to render a declaratory judgment.

XIV.

In answer to paragraph 20, intervening defendants deny the allegation contained therein. Intervening defendants aver that the orders of the Commission in this proceeding are lawful and valid in all respects and the results of these lawful and valid orders of the Commission do not constitute a legal basis for instituting and maintaining this cause.

[fol. 44] Further answering, intervening defendants aver that plaintiffs have not shown any legal damage to require the issuance of an interlocutory injunction pending determination by this Court of this suit.

Wherefore, intervening defendants pray that the relief sought in the complaint be denied, and that the complaint

be denied, and that the complaint be dismissed, plaintiffs to pay the costs.

Respectfully submitted,

Donald M. Tolmie, 652 Union Station, Chicago 6, Illinois; Eugene S. Davis, 1667 Railway Exchange Building, St. Louis 1, Missouri; Richard J. Murphy, 1225 LaSalle Street Station, Chicago 5, Illinois; James A. Gillen, James E. Steffarud, 547 W. Jackson Blvd., Chicago 6, Illinois; Don McDevitt, LaSalle Street Station, Chicago 5, Illinois; John W. Adams, 104 St. Francis St., Mobile 13, Alabama; James M. Souby, Jr., 80 E. Jackson Blvd., Chicago 4, Illinois.

[fol. 48]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

[Title omitted]

MOTION OF UNITED STATES AND INTERSTATE COMMERCE COMMISSION TO DISMISS COMPLAINT—Filed April 11, 1960

Now come the defendants United States of America and the Interstate Commerce Commission and move this Court to dismiss the complaint because (1) the cause is moot, and (2) the Court is without jurisdiction to grant relief by way of declaratory judgment against the defendants. As reasons hereto the defendants state as follows:

I.

The cause is moot.

The complaint challenges the validity of the Commission's Fourth Section Order No. 19059, as supplemented, entered in the proceeding entitled *Grain and Grain Products from Illinois to the East.* By this order, as amended, the rail carriers were granted temporary authority by the Commission, pending hearing, to publish rates which would depart

from the long and short haul provisions of Section 4 of [fol. 49] the Interstate Commerce Act, 49 U.S.C. Section 4. The fourth section of the Interstate Commerce Act provides in part:

> It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distance point that is not reasonably compensatory for the service performed: and no such authorization shall be granted on account of merely potential water competition not actually in existence: * * *

The Act has not taken away the right of the carriers " * * * to initiate rates * * * in the first instance * * * " *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 564. However, where rail or water carriers subject to Part I of the Interstate Commerce Act (49 U.S.C. Section 1, et seq.) seek to publish rates which would result in lower charges for a long-haul movement than for shorter distances, prior approval must be obtained from the Commis-

sion pursuant to Section 4 of the Act. Nevertheless, where carriers have in effect rates which do not comply with the provisions of Section 4 of the Act, either with or without approval of the Commission, they are free to exercise their option of removing the discrimination, "either by raising the lower rate to the relative level of the higher, or by lowering the higher to the relative level of the lower, or by [fol. 50] equalizing conditions through fixing rates at some intermediate point." *Skinner & Eddy Corp.* v. *United States, supra,* at 566. Since the filing of the complaint in the instant case, the rail carriers, exercising their option, have put in effect new schedules containing reduced rates at the intermediate points, thus eliminating the fourth section departures. As a result of this action, the rail carriers no longer require the temporary fourth section authority granted by the Commission which is challenged here by the plaintiffs.

By letter dated March 28, 1960 (see Appendix 1), the rail carriers notified the Commission of the withdrawal of the fourth section applications and requested cancellation of the temporary fourth section orders which are the subject of the complaint. On March 31, 1960, the Commission acknowledged the withdrawal of the fourth section applications. (See Appendix 2, letter by Harold D. McCoy, Secretary of the Commission, addressed to Mr. E. W. Heimert, Manager, Central Territory Traffic Commerce Bureau, and Traffic Executive Association—Eastern Railroads.)

In view of the action taken by the railroads, which has eliminated the need for fourth section relief, the matter before this Court is now moot. See *Coastwise Lines* v. *United States and Interstate Commerce Commission*, 157 F. Supp. 305, and see also *Arkansas & Louisiana Missouri Railway Co.* v. *Amarillo-Borger Express, Inc.*, 352 U.S. 1028; *Dixie Carriers, Inc.* v. *United States*, 359 U.S. 179. Since the matter has been rendered moot by the filing of the new schedules of rates (see *Coastwise Lines* v. *United States and Interstate Commerce Commission*, 157 F. Supp. 305, 306), there no longer exists any basis for plaintiffs' prayer for a declaratory judgment, assuming jurisdiction in this Court to afford such relief against these defendants.

Taylor v. *McElroy*, 360 U.S. 709; *Shank* v. *National Labor Relations Board*, 260 F. 2d 444; *Winsor* v. *Daumit*, 185 F. 2d 41. Thus, "The Act of June 14, 1934, providing for declara- [fol. 51] tory judgments, does not attempt to change the essential requisites for the exercise of judicial power. By its terms it applies to 'cases of actual controversy,' a phrase which must be taken to connote a controversy of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts." *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 325; *Brown* v. *Ramsey*, 185 F. 2d 225, CA 8; see also *United States* v. *Hamburg American Co.*, 239 U.S. 466, where the Supreme Court stated at pages 475-476:

> The duty of this court as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.

The complaint should be dismissed because the matter is moot.

II.

Plaintiffs are not entitled to relief by way of Declaratory Judgment.

In the event the Court is of the opinion that the matter is not moot, then it is urged that the complaint be dismissed because relief by way of declaratory judgment is not available to the plaintiffs. In *Public Service Commission of Utah* v. *Wycoff*, 344 U.S. 273, at page 246, the Supreme Court specifically held that " * * * the declaratory

judgment procedure will not be used to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal *any more than it* [fol. 52] *will be used as a substitute for statutory methods of review.*" (Emphasis added). See also *Transamerica Corp.* v. *McCabe*, 80 F. Supp. 704, 707, and *Magnolia Petroleum Co.* v. *Texas Illinois Nat. Gas P. Co.*, 130 F. Supp. 890. Since the provisions of the Urgent Deficiencies Act, 28 U.S.C., Sections 1336, 2284, 2321-25, expressly provide the sole "statutory methods of review" of orders of the Interstate Commerce Commission such as those challenged here, relief by way of declaratory judgment cannot be used as a substitute. *Charles Noeding Trucking Co.* v. *United States*, 29 F. Supp. 537, 553-554.

In any case, the Declaratory Judgment Act is inapplicable to this cause for the reason that the requisite consent of the United States to be sued for a declaratory judgment is lacking. See *Love* v. *United States*, 108 F. 2d 43, 50, CA 8, cert. den. 309 U.S. 673; *Isner* v. *Interstate Commerce Commission*, 90 F. Supp. 361; *Yeskel* v. *United States*, 31 F. Supp. 956, 958. The United States, which is the statutory defendant in this case, has waived its sovereignty from suit in this type of action only to the extent set forth in Title 28, U.S.C., Sections 1336, 2284, and 2321-25, and such waiver cannot be enlarged by joining in such suit a prayer for a declaratory judgment.

For the reasons stated above, it is respectfully submitted that the complaint should be dismissed.

Robert W. Ginnane, General Counsel; H. Neil Garson, Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Interstate Commerce Commission.

[fol. 53] Robert A. Bicks, Acting Assistant Attorney General; William H. Webster, United States Attorney, St. Louis 1, Missouri; James H. Durkin, Attorney, Department of Justice, Washington 25, D. C., Attorneys for United States of America.

Certificate of Service (omitted in printing).

[fol. 54]

APPENDIX 1 TO MOTION TO DISMISS

TRAFFIC EXECUTIVE ASSOCIATION—
EASTERN RAILROADS
E. V. Hill, Chairman
R. C. Gill, General Commerce Manager

CENTRAL TERRITORY TRAFFIC
COMMERCE BUREAU
E. W. Heimert, Manager

1100 State Madison Bldg.
22 W. Madison Street
Chicago 2, Illinois
Tel. FInancial 6-3520

March 28, 1960

File: D-ICC Dkt. 32790

Mr. Harold D. McCoy, Secretary
Interstate Commerce Commission
Washington 25, D. C.

Dear Sir:

On December 4, 1958, Tariff Publishing Officer Hinsch filed Fourth Section Application No. 35140 seeking relief in connection with adjustment of rates on grain and grain products from northwestern Illinois to destinations in Official territory as designated therein, seeking authority to maintain higher rates from intermediate territory Chicago and east. By Fourth Section Order No. 19059 the Commission issued temporary relief permitting the establishment of the rates sought effective January 10, 1959. Subsequent to the original application, the following Fourth Section Applications were filed: 35507, 35559 and 35623. These Applications expanded the origin territory included in the original Application. By supplements to the original order the Commission permitted temporary relief from the addi-

tional territory. The original Application was set down for hearing with investigation in I.C.C. Docket No. 32790.

In July, 1959, a hearing was held in that investigation before Examiner Kassel. Subsequently a petition was filed for further hearing on Fourth Section Application 35140 and I.C.C. Docket 32790, also for consolidation of that proceeding with the other Fourth Section Applications and Investigation Docket No. 33132. By order dated October 28, 1959, the Commission consolidated the proceedings and ordered further hearing.

[fol. 55] The applicant railroads published, effective March 10, 1960, reduced rates from Chicago and points east thereof in the tariffs listed in Appendix A. These publications reduced the rates from intermediate points via all short tariff routes from all origins included in the aforementioned Fourth Section Applications so that they in no case exceed the rate from the more distant points in northwestern Illinois or Wisconsin.

By virtue of these tariff publications relief from the provisions of Section 4 of the Act is no longer required in connection with the adjustment involved and the tariff situations that made necessary the filing of the aforementioned Applications no longer exist. For these reasons applicants wish to withdraw, and do hereby withdraw, the following Fourth Section Applications: 35140, 35507, 35559 and 35623. It is our understanding that the result of this withdrawal is the discontinuance of any proceedings under those application numbers, and that the temporary Fourth Section Orders issued in response to this Application will be cancelled and the authority discontinued.

A copy of this letter is being mailed to all parties of record.

Very truly yours,

E. W. Heimert
On Behalf of Applicants

Encl.

EWH:dc

[fol. 56]

APPENDIX A TO APPENDIX 1

Issuing Agency	*Tariff*
Central Territory Railroads Tariff Bureau	Supplements 150 and 151 to Freight Tariff 245-H, I.C.C. 4493 (Hinsch Series)
Central Territory Railroads Tariff Bureau	Supplement 75 to Freight Tariff 535-C, I.C.C. 4499 (Hinsch Series)
Trunk Line—Central Territory Railroads Tariff Bureau	Supplements 3 and 4 to Freight Tariff 111-Q, I.C.C. C-64
Chesapeake and Ohio Railway Company	Supplement 45 to Freight Tariff 2410-F, I.C.C. 13591
Chicago & Eastern Illinois Railroad Company	Supplement 6 to Freight Tariff 610-C, I.C.C. 300
Chicago, Milwaukee, St. Paul and Pacific Railroad Company	Supplement 24 to G.F.D. No. 15165-F, I.C.C. No. B-7721
Chicago South Shore and South Bend Railroad	Supplement 4 to Freight Tariff 95-E, I.C.C. 225
Erie Railroad Company	Supplement 30 to Freight Tariff 182-K, I.C.C. A-7719
Grand Trunk Western Railroad Company	Supplement 44 to Freight Tariff 309-L, I.C.C. A-78
Illinois Central Railroad Company	Supplement 24 to Tariff 1809-Q, I.C.C. A-11566
Monon Railroad	Supplement 43 to Freight Tariff 520-H, I.C.C. 4792
New York Central Railroad Company	Supplement 199 to Freight Tariff 701-A, I.C.C. 1169
New York, Chicago and St. Louis Railroad Company	Supplement 41 to Freight Tariff 15-X, I.C.C. 6299

Issuing Agency	*Tariff*
Pennsylvania Railroad Company	Supplement 86 to Freight Tariff 73-E, I.C.C. 3311
Wabash Railroad Company	Supplement 90 to Freight Tariff 19730-B, I.C.C. 7646

[fol. 57]

APPENDIX 2 TO MOTION TO DISMISS

PWC/mtm

March 31, 1960
F. S. A. 35140
35507
35559-
35623

Mr. E. W. Heimert, Manager,
Central Territory Traffic Commerce Bureau,
Traffic Executive Association-Eastern Railroads,
22 West Madison Street,
Chicago 2, Illinois.

Dear Sir:

This has reference to your letter of March 28, 1960, file D-ICC Dkt. 32790, relative to long-and-short-haul relief sought by the above-numbered fourth-section applications with respect to rates on grain and related articles, in carloads, from points in Illinois.

Your letter states that, by publication of rates from Chicago, Ill., and points east thereof, the rates covered by these applications have been conformed to the provisions of section 4 of the Interstate Commerce Act, and that the relief sought is no longer necessary.

Accordingly, applications Nos. 35140, 35507, 35559, and 35623 will be considered as withdrawn.

Respectfully,

Secretary.

[fol. 58]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Title omitted]

MOTION OF INTERVENING RAILROAD DEFENDANTS TO DISMISS COMPLAINT—Filed April 14, 1960

Now come the Railroad Intervening Defendants in the above-entitled action and move to dismiss the complaint for the reasons that:

1. The facts have altered since the filing of the complaint which make the issue of injunctive relief moot;
2. There is not an "actual controversy" within the scope of the Declaratory Judgment Act necessary for the jurisdiction of the Court; and
3. A declaratory judgment is inappropriate since the Urgent Deficiencies Act, 28 U.S.C. §1336, 2284, 2321-25, provide for the sole statutory method of review of orders of the Interstate Commerce Commission.

Wherefore, Intervening Defendants pray that this Court enter an order dismissing the complaint.

Respectfully submitted,

Donald M. Tolmie, Room 652—Union Station, Chicago 6, Illinois; Eugene S. Davis, 1667 Railway Exchange Building, St. Louis 1, Missouri; Richard [fol. 59] J. Murphy, 1225 LaSalle Street Station, Chicago 5, Illinois; James A. Gillen and James E. Steffarud, 547 West Jackson Boulevard, Chicago 6, Illinois; Don McDevitt, LaSalle Street Station, Chicago 5, Illinois; John W. Adams, 104 St. Francis Street, Mobile 13, Alabama; James M. Souby, Jr., 80 East Jackson Boulevard, Chicago 4, Illinois.

[fol. 63]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Title omitted]

MOTION OF BARGE LINE PLAINTIFFS FOR SUMMARY JUDGMENT —Filed June 23, 1960

Come now the barge line plaintiffs, by their attorneys, Lord, Bissell & Brook, Edward B. Hayes, Wilbur S. Legg, Thompson, Mitchell, Douglas & Neill, William G. Guerri and J. Richard Skouby, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, move the Court for a determination that no issue of fact is presented in this proceeding and further that, after submission of briefs as hereinafter more specifically prayed, the Court enter summarily (sic) judgment as prayed in the Complaint herein. For their reasons these plaintiffs show the Court that:

1. Plaintiffs on November 16, 1959, filed their complaint against defendants, United States of America and the Interstate Commerce Commission, which said Complaint con-
[fol. 64] sisted of twenty numbered paragraphs and a prayer for relief.

2. On January 15, 1960, the aforesaid defendants filed their answer to plaintiffs' Complaint, which said Answer admitted the factual allegations of the Complaint in their entirety, except as to those facts which it neither admitted nor denied because of lack of knowledge, and those as to which it stated no answer was required. The said answer denied certain legal conclusions stated in the Complaint but it did not deny any allegations of fact.

3. Thereafter, the intervening defendants were permitted to file their answer to plaintiffs' complaint which said answer was substantially identical to the answer of the defendants United States and Interstate Commerce Commission, referred to heretofore and which answer ad-

mitted or failed to deny all the factual allegations of the plaintiffs' complaint.

4. As the pleadings in this cause demonstrate, there is no genuine issue of fact involved, all facts having been admitted and the cause is, therefore, in a posture to allow the Court to dispose of it summarily and thus avoid expense, vexation and delay.

5. The allegations of fact contained in plaintiffs' complaint are supported by affidavits of persons having personal knowledge thereof, which are submitted with this [fol. 65] motion.

6. Defendants have further averred in their answers aforesaid that plaintiffs' have not shown legal damage sufficient to justify the issuance of an interlocutory injunction pending determination of this suit by this Court. Affidavits filed herewith set forth the damage which has been sustained and will be suffered by plaintiffs as the result of the void and illegal actions of the Interstate Commerce Commission in granting "temporary authority" orders permitting Fourth Section Violations by the intervening defendants.

Wherefore, plaintiffs ask for a ruling by this Court that this cause presents no genuine issue of material fact and is suitable for determination under the summary judgment procedures provided by Rule 56 of the Federal Rules of Civil Procedure.

Plaintiffs further ask that in the event the Court so rules, it grant plaintiffs 30 (thirty) days in which to present their brief on the merits of their Complaint, 30 (thirty) days for defendants to answer and 15 (fifteen) additional days for plaintiffs to reply, after which plaintiffs pray that this Court grant summary judgment in their favor upon the Complaint and affidavits filed herein.

[fol. 66] William G. Guerri, J. Richard Skouby, 705 Olive Street, St. Louis, Missouri, Phone: CEntral 1-0545.

Thompson, Mitchell, Douglas & Neill, 705 Olive Street, St. Louis, Missouri.

Edward B. Hayes, Wilbur S. Legg, 135 South LaSalle Street, Chicago 3, Illinois.

Lord, Bissell & Brook, 135 South LaSalle Street, Chicago 3, Illinois.

Attorneys for Plaintiffs, A. L. Mechling Barge Lines, Inc., Mississippi Valley Barge Line Company, The Ohio River Company, Blaske, Inc.

[fol. 67]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

[Title omitted]

AFFIDAVIT OF WESLEY A. ROGERS

State of Illinois,
County of Cook, ss.:

Affiant being first duly sworn on oath, deposes and says as follows:

1. Affiant is the Chairman of the Waterways Freight Bureau, 28 East Jackson Boulevard, Chicago 4, Illinois, an association organized under authority of the Interstate Commerce Commission extended under Section 5a of the Interstate Commerce Act. The fifteen members of the Waterways Freight Bureau account for virtually all the [fol. 68] grain transported by barge to Chicago, Illinois from the Illinois Waterway ports of Lacon, Hennepin, Henry, Spring Valley, La Salle, Ottawa, Seneca, Morris, Joliet and Lockport, Illinois. Of the various members engaged in such transportation A. L. Mechling Barge Lines Inc. is, and has been for some time, the carrier of the largest volume of such grain. The Ohio River Company, Mississippi Valley Barge Line Company, and American Commercial Barge Line Company with its subsidiary Blaske, Inc. also carry appreciable amounts of grain in such trade.

2. On December 4, 1958, the Western and Eastern Railroads published tariffs of rail rates to be effective January 10, 1959, which reduced combination rail rates from most origins in Illinois north of the Illinois River upstream from Spring Valley, Illinois, to eastern destinations. These rates applied to corn, oats and soybeans and their products when shipped by rail via Chicago. These combination rates were lower than the then existing rail rates charged for shorter rail hauls from Chicago and other intermediate origins over the same line to the same eastern destinations, and the involved railroads therefore applied to the Interstate Commerce Commission for authorization to charge these rates which without such authority would have been prohibited by Section 4 of the Interstate Commerce Act. On [fol. 69] behalf of all interested members of the Waterways Freight Bureau, affiant protested to the Commission against the grant of requested authority. Nevertheless without any prior hearing on January 9, 1959, the Commission entered its Fourth Section Order No. 19059, granting authority to make the reduced rates effective, but made no findings in said order, other than statements that the Commission did not approve the rates and that a hearing would be held. On January 10, 1959, said reduced combination rates became effective and continued in effect until March 10, 1960, when they were superseded by single factor rates at the same level. After requesting and being denied reconsideration of the Commission's Fourth Section Order No. 19059, the Waterways Freight Bureau participated in hearings held from July 7, 1959 to July 16, 1959, before an Examiner appointed by the Commission. It now appears that by reason of said railroads' publication of the aforesaid single factor rates no order with respect to the rates published on January 10, 1959 and containing findings based on evidence will ever be entered by the Commission.

3. Members of the Waterways Freight Bureau have reported to affiant the amount of corn, oats and soybeans they carried to Chicago from the ten Illinois River ports named above during the years 1958 and 1959. A compila- [fol. 70] tion of these reports shows that during the calendar year 1958 members of the Waterways Freight Bureau transported 1,210,821 tons (of 2,000 lbs.) of corn, oats and

soybeans to Chicago via the Illinois River from the ten river ports listed in paragraph 1 of this affidavit. During the calendar year 1959 this tonnage figure was reduced to 1,020,860 tons.

4. Between April 9, 1958 and November 19, 1959 the Waterways Freight Bureau protested nine separate and distinct Fourth Section relief applications in which "temporary" Fourth Section relief was sought and obtained from the Interstate Commerce Commission. Of those nine, only one has finally reached a final determination granting permanent Fourth Section relief, and that was after the "temporary" rates had been in effect sixteen months. In one case the Fourth Section application was withdrawn shortly after a temporary restraining order against the Commission was obtained from the District Court, and in still another case the Fourth Section application was withdrawn before any hearings were held. These rates, however, had been in effect four or five months. In the case which gave rise to the instant lawsuit, the Fourth Section application was withdrawn by the carrier applicant after the Commission's temporary order was challenged in this Court but [fol. 71] not until the protested "temporary" rates had been in effect fourteen months. The remaining five cases are still awaiting decision from the Commission. As to these cases the railroads involved have been operating under temporary authority for periods ranging from seven to eighteen months. Three of these cases have never been heard at all, while the final two are still awaiting decisions from the Commission on hearings completed in March of 1959.

Further affiant sayeth not.

Wesley A. Rogers

Subscribed and Sworn to before
me this 22nd day of June, 1960.

Beatrice L. McManus, Notary Public.

[fol. 72]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Title omitted]

AFFIDAVIT OF F. A. MECHLING

State of Illinois,
County of Will, ss :

Affiant being first duly sworn, on oath deposes and says as follows:

1. He is the Executive Vice President of A. L. Mechling Barge Lines Inc., 51 North Desplaines Street, Joliet, Illinois (hereinafter called "Mechling"), and by virtue of his position has knowledge of the business operations of that company. He has been associated with that company in various capacities since 1939.

[fol. 73] 2. Mechling is a common carrier by water, holding certificates of public convenience and necessity for such common carriage from the Interstate Commerce Commission (hereinafter sometimes called the "Commission") and from the Illinois Commerce Commission. Such certificates, among other things, authorize Mechling to transport grain in interstate and intrastate commerce from points on the Illinois River and Waterway to Chicago, Illinois. Mechling has been for several years a principal barge water carrier of grain to Chicago, transporting from sixty per cent to seventy per cent of the grain carried by water to Chicago via the Illinois River and Waterway.

3. On June 28, 1957, the "Traffic Executive Association—Eastern Railroads" acting on behalf of western and eastern railroads but principally on behalf of the New York Central Railroad, applied to the Interstate Commerce Commission for authorization to be relieved from the prohibitions of Section 4 of the Interstate Commerce Act, in order that such railroads might charge certain lower combination

rates for the transportation of corn and corn products from origin stations on the New York Central Railroad west of Kankakee, Illinois (this part of the New York Central Railroad, coming into Kankakee from the west, roughly parallels the Illinois River and Waterway to Chicago at distances of four to twenty-five miles) to destinations east of Kankakee; which combination rail rates from west of Kankakee [fol. 74] to the east would be *lower* than the rail rates contemporaneously charged for the *shorter* hauls from origin stations east of Kankakee on the same line to the same eastern destinations. Such reduction in the combination rail rates to the east from New York Central origins west of Kankakee was effected by reduction of the factor in those rates applying for the part of the rail haul up to Kankakee.

Mechling, together with the Indiana Farm Bureau Cooperative Association, the Chicago Board of Trade, various grain shippers, and various country elevator operators on other railroads competing with elevators at the origin stations on the New York Central Railroad west of Kankakee, filed protests with the Interstate Commerce Commission against this application to depart from Section 4 of the Interstate Commerce Act, alleging among other things that the reduced factor of the combination rate applicable to transportation of corn from its origin to Kankakee, Illinois, which was competitive with barge transportation, was so low that it was noncompensatory to the railroads, and that it was lower than necessary to meet barge competition and thus destructively competitive of the water competition used to justify it. Nevertheless on August 27, 1957, the Commission issued its Fourth Section Order No. 18784, authorizing the railroads to charge such lower rate combination and for longer rail hauls. This order contained [fol. 75] no findings as to the propriety of the rates other than statements that the Commission did not approve the rates for which it stated it gave authority and that a hearing would be held with respect to them. On August 28, 1957, on the complaint of Mechling and Cargill, Inc., in The District Court of the United States for the Northern District of Illinois, Eastern Division, in Civil No. 57 C 1450, the court issued a temporary restraining order prohibiting the charging of these reduced rates from the origins west

of Kankakee. This temporary restraining order remained in effect until November 28, 1957, when the action in which it was entered was dismissed on motion of the United States without hearing on the merits. Thereafter, from January 29 through February 4, 1958, the Commission by its Examiner held the hearing referred to in its said Fourth Section Order No. 18784.

On or about March 16, 1959, the Commission's Examiner, having conducted said hearings and heard the evidence, issued a report analyzing the evidence and finding thereon that the New York Central-Railroad's said reduced barge-competitive rate was too low to meet the costs of the railroad in handling the traffic moving on such depressed rail rate, saying (referring to said rate) that: "The conclusion that the proposed rate will not meet the bare out-of-pocket costs is inescapable"; and further finding that said rate is lower than necessary to meet barge competition; and [fol. 76] recommending, therefore, that the said application of the railroads on June 28, 1957, for authority to depart from the long-haul short-haul rule of Section 4 be denied.

On October 29, 1959, the Commission heard oral arguments on the exceptions to the Examiner's report and the replies thereto which had been submitted by June 5, 1959. To date the Commission has issued no further order in this proceeding, and the said new rail rates which depart from the long-haul short-haul requirement of Section 4, which the Commission has never approved, and which its Examiner has condemned as noncompensatory and destructive as above, remain in effect under the said "temporary" order of August, 1957. These rates were avowedly designed by the rail proponents thereof to divert corn produced in the area south of the Illinois River from the water carriers on the Illinois River to the New York Central Railroad, and have in fact diverted large amounts of corn from Mechling to the New York Central Railroad, to the continuing and irreparable injury of Mechling.

4. On December 4, 1958, the Western and Eastern Railroads published other tariffs of rail rates to be effective January 10, 1959, which reduced combination rail rates from most origins in Illinois north of the Illinois River upstream from Spring Valley, Illinois, to eastern destina-

tions. These rates applied to corn, oats and soybeans, and many products of these grains when transportation was [fol. 77] via Chicago. These combination rates, when published, were lower than the rail rates contemporaneously charged for shorter rail hauls from Chicago and other intermediate origins over the same line to the same eastern destinations, and the railroads therefore applied to the Commission for authorization of these further departures from the long-and-short haul prohibition of Section 4 of the Interstate Commerce Act. Mechling, the Waterways Freight Bureau, Cargill, Inc. and other shippers and various cities again protested grant of such authority and requested a hearing, but nevertheless, on January 9, 1959, the Commission entered its Fourth Section Order No. 19059, stating that it granted authority to make these reduced rates effective. Again, this order contained no findings as to the propriety of the rates it stated that it authorized other than statements that the Commission did not approve the rates, and that a hearing would be held (no hearing thereon having been held). On January 10, 1959, these further reduced combination rail rates were put into effect. No date for such hearing having been set, on January 29, 1959, Mechling and Cargill, Inc., complainants herein, submitted a petition to the Commission for reconsideration and motion to vacate the Commission's said Fourth Section Order No. 19059, setting forth among other things the lack of findings in the last said order and failure of the Commission to hold the hearing which it had found to be neces- [fol. 78] sary. This petition was denied on or about March 10, 1959. Commencing July 7th and until July 16, 1959, the Commission by its Examiner heard evidence on the application to authorize the last said rates (published on December 4, 1958) in a combined hearing of its Docket No. 32790 and its Fourth Section Application Docket No. 35140. In the meantime the applicant railroads in various additional applications requested extension of the area west of Chicago of the origins from which they could apply these Fourth Section departure rates. Over the protests of Mechling, of Waterways Freight Bureau and Cargill, Inc., the Commission by supplements to its said Fourth Section Order No. 19059 (still without findings or hearing, and with-

out approval of such rates) entered orders stating that it authorized such extensions to be made effective; until, by September 10, 1959, the origin area from which such rail rates were being applied (viz., rates departing from the Fourth Section of the Interstate Commerce Act which the Commission purported to authorize as above stated in detail without any findings as to their propriety except for statements in the orders of authorization that the Commission did not approve them and that a hearing would be held) included territory extending for several miles north and south of the Illinois River and Waterway, from a point near Lacon, Illinois, to Chicago, Illinois.

[fol. 79] Mechling had duly and timely protested to the Commission that the rates so put into effect were so low that, although they were purportedly designed to enable the railroads to compete with the barge transportation on the Illinois River and Waterway to Chicago, they in fact would substantially destroy barge transportation of those products, and affiant so testified during the hearing in F.S.A. 35140. The hearings were closed. On October 31, 1959, the Commission, after petition by the railroads for reopening of the hearings in F.S.A. 35140, and over the objection of Mechling and Waterways Freight Bureau, reopened the hearings, but did not set any date for further hearing. No further hearing has been held thereon. It now appears none will be held, by reason of the fact that the applicant railroads involved in F.S.A. No. 35140 reduced the intermediate rates on the direct routes so as not to be higher than the rates from the said area west of Chicago in which the applicant railroads and barge carriers are competitive.

5. The effect of the reduction of the railroad rates pursuant to the authority to depart from the 4th Section of the Interstate Commerce Act granted by the Commission without findings or approval of such departures in said Orders Nos. 18784 and 19059 as supplemented, has been to reduce the amount of corn, oats and soybeans carried by Mechling to Chicago from Illinois Waterway origins by almost 200,000 [fol. 80] tons annually as determined from a comparison of 1959 movements with those in 1957. During the first quarter of 1960, an even greater decrease in such shipments

has occurred, Mechling's shipments of these grains being less than fifty per cent of even the reduced volume carried in 1959. The loss of this large volume of traffic that has been diverted to the railroads by said depressed rail rates has resulted in loss of the profit usually earned on this portion of Mechling's business, and in addition, has resulted in an operating loss thereon to Mechling of approximately $85,000.00 in the year 1959, despite reductions in service and other economies in operation effected by Mechling in the meantime. Mechling now has removed from this service nineteen barges (having a total capacity of 18,050 tons) and six towboats which formerly were used in it. It is apparent that affiant's water transportation of grain to Chicago cannot continue if this severe and progressive reduction in the volume carried continues.

Further affiant sayeth not.

F. A. Mechling

Subscribed and Sworn to before
me this 15th day of June, 1960.

Beatrice L. McManus, Notary Public.

[fol. 81]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

No. 59 C 335 (3)

CARGILL, INCORPORATED, a corporation, et al., Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

THE PENNSYLVANIA RAILROAD COMPANY, et al., Intervening Defendants.

ORDER GRANTING DEFENDANTS' AND INTERVENORS' MOTIONS TO DISMISS—September 16, 1960

This cause was presented to the Court upon Motions to Dismiss filed by defendants and intervenors. Oral argument was heard, memoranda filed, and the matter taken under submission. The Court being fully advised in the premises, files its per curiam opinion and in accordance therewith it is

Ordered that defendants' and intervenors' Motions to Dismiss be and the same are hereby sustained and plaintiffs' Complaint is dismissed and the relief therein prayed for denied.

Done this 16th day of September, 1960.

M. C. Matthes, Judge, United States Court of Appeals, Roy W. Harper, Judge, United States District Court, Randolph H. Weber, Judge, United States District Court.

[fol. 82]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

No. 59 C 335 (3)

CARGILL, INCORPORATED, a corporation, et al., Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

THE PENNSYLVANIA RAILROAD COMPANY, et al., Intervening Defendants.

OPINION—September 16, 1960

Before M. C. Matthes, Circuit Judge, Roy W. Harper, Chief Judge, and Randolph H. Weber, District Judge.

Per Curiam.

Plaintiffs are barge line operators. They commenced this action on November 16, 1959, against the United States of America and the Interstate Commerce Commission seeking an injunction of the Commission's Fourth Section order No. 19059, entered January 9, 1959, and for a declaratory judgment. They are in competition with various railroads which can be classified into two groups: one, the eastern group which has trunk lines from Chicago, Illinois, to the east and with proportional or re-shipping rates for long hauls and, two, the western group which has lines serving west of Chicago and with short haul rates that are higher than the eastern long haul rates. These railroads were granted leave to intervene.

[fol. 83] District Courts have jurisdiction of actions to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission, §1336, Title 28, U.S.C., and the action has been brought in the judicial district of parties plaintiff as provided by §1398, Title 28, U.S.C. A three-judge court was duly composed under the provisions of §§2284 and 2321-2325, Title 28, U.S.C. Motions to Dismiss were filed by defendants and intervenors challenging plaintiffs' Petition on the grounds of mootness and that declaratory judgment relief would not lie. These Motions were orally heard, supporting memoranda filed and the matter taken under submission.

The actions of the Interstate Commerce Commission for which plaintiffs seek relief in this suit involve the matter wherein the intervenors published rates with the Commission in which combination (long haul) rates were lower than local (short haul) rates and relief was sought under Section Four of the Interstate Commerce Act.[1] The pro-

[1] §4, Title 49, U.S.C., provides that "it shall be unlawful for any common carrier * * * to charge or receive any greater compensation in the aggregate * * *, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, * * *: Provided, That *upon application* to the Commission *and after investigation*, such carrier, *in special cases*, may be authorized * * * to charge less for longer than for shorter distances * * *, and the Commission may from time to time prescribe the extent to which such designated carriers

[fol. 84] ceeding was entitled "Grain and Grain Products from Illinois to the East" and the plaintiffs here filed their protests.

The order of the Commission provided that the rates described in the application would become effective January 10, 1959, that they were subject to the Commission's investigation and approval, could not be increased unless authorized and the investigation would be made "with a view to making such findings and orders in the premises as the facts and circumstances shall warrant." The matter was assigned for hearing at a time and place thereafter to be fixed and the intervenors here were permitted to become respondents to the proceedings.

Plaintiffs contend in this action that the establishment of rates, pending the hearing on the Section Four application and prior to actual investigation, hearing and finding of facts, amounts to an avoidance of the prohibitions contained in Section Four, which make it unlawful to charge or receive such rates. They say that such establishment of rates amounts to the granting of a "temporary rate" and is void and unlawful, arbitrary and capricious, thus depriving them of their property without due process of law and violative of the Fifth Amendment to the Constitution. On the declaratory judgment side, plaintiffs contend that this procedure is a continuous practice by the Interstate Commerce Commission; that the Commission thus establishes a rate without support by adequate findings from which it can be determined if the facts constitute a special [fol. 85] case and if the rates are reasonably compensatory, all as required by Section Four; and that the Commission will probably enter a final order of dismissal to make the matter "moot" before this Court can hear and decide the issues and that such practice, too, has been followed in the past and is continuing to plaintiffs' damage.

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may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it * * *, the Commission shall not permit the establishment of any charge to or from the more distant point that is *not reasonably* compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence; * * *." (Italics supplied for emphasis.)

The defendants and intervenors point out that the rail carriers did notify the Commission on March 28, 1960, of the withdrawal of their Section Four Application and requested cancellation of the Commission's temporary orders. The Commission acted upon this notification on March 31, 1960, and the application was permitted to be withdrawn. They further state that the Commission records show that a new schedule of rates has been filed, reducing the local haul charges to where, in the aggregate, they will not exceed the long haul charges, and therefore, there is no further relief being sought, nor can it be given, under Section Four and the matter is "moot".

Plaintiffs, however, contend that this is a continuing practice of the Commission which results to their damage and say that this should remove the matter from the realm of mootness. They want this Court to not only enjoin and hold unlawful the Section Four order but to also declare the practice improper.

It is the duty of this Court to "decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect [fol. 86] the matter in issue in the case before it." *Mills* v. *Green*, 159 U.S. 651, 653. This principle was recently restated by the Supreme Court in the case of *Local No. 8-6, Oil, Chemical & Atomic Wkrs.* v. *Missouri*, 361 U.S. 363. In this latter case an injunction had been granted against a union under authority of a Missouri statute; the Supreme Court of Missouri held the statute constitutional and certiorari was granted to the Supreme Court of the United States; in the meantime the injunction had expired and in deciding the matter the Court said at l.c. 367: " • • • we cannot escape the conclusion that there remains for this Court no 'actual matters in controversy essential to the decision of the particular case before it.' *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 116."

"A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *Amalgamated Assoc.* v. *Wisconsin Emp. Rel. Bd.*, 340 U.S. 416, 418. The very proposition here was involved in two recent decisions

wherein the Supreme Court of the United States remanded three-judge court opinions with directions to dismiss for mootness. See *A.T. & S.F. R. Co.* v. *Dixie Carriers, Inc.* 143 F. Supp. 844, 355 U.S. 179, and *Amarillo-Borger Express* v. *United States*, 138 F. Supp. 411, 352 U.S. 1028.

The same reasoning applies to the prayer for declaratory judgment relief. Section 2201, Title 28, U.S.C., creates a [fol. 87] remedy "In a case of actual controversy within its jurisdiction, * * * ."

There is nothing pending in the case before us. The cause of any controversy that existed has been terminated by dismissal. To lay down rules of practice for future guidance of the Commission would be nothing more than the substitution of judicial for executive administration. The Judiciary must confine itself within the constitutional and legislative grants of authority to review, determine or declare rights only where actual controversies exist. As said in *Local No. 8-6, Oil, Chemical & Atomic Wkrs.* v. *Missouri*, supra, at l.c. 396: "To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain."

For the reasons stated, defendants' and intervenors' Motions to Dismiss should be sustained and an Order will be entered to that effect.

[fol. 89]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed October 21, 1960

I. Notice is hereby given that A. L. Mechling Barge Lines Inc., Mississippi Valley Barge Line Company, The Ohio River Company, and Blaske, Inc., plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final order granting defendants' motion to dis-

miss the complaint entered in this action on September 16, 1960.

This appeal is taken pursuant to 28 USCA § 1253.

II. The Clerk will please prepare a transcript of the entire record in this cause for transmission to the Clerk of the Supreme Court.

III. The following questions are presented by this appeal:

1. Does the Interstate Commerce Commission have the power and authority to authorize carriers subject to Part I of the Interstate Commerce Act to charge rates, on a temporary basis or otherwise, which deviate from the requirements of Section 4 of the said [fol. 90] Act, without holding hearings on such rates, the Commission itself having expressly found that hearings were necessary in the matter, and without making any findings of facts to show that a "special case" exists within the meaning of the Act sufficient to justify the allowance of such rate departures under the terms of Section 4 of the Interstate Commerce Act?

2. Are suits reviewing orders of the Interstate Commerce Commission entered as a recurring practice, without hearing or findings of facts, authorizing a carrier subject to the provisions of the Interstate Commerce Act to charge rates which deviate from the requirements of Section 4 of that Act and causing great and repeated injury to the appellants rendered moot because as part of a consistent and repeated practice the carriers withdraw and cancel the rates which are the subject of such orders whenever they are judicially challenged?

Edward B. Hayes, Wilbur S. Legg, Lord, Bissell & Brook, Attorneys for A. L. Mechling Barge Lines Inc., Mississippi Valley Barge Line Company, The Ohio River Company, and Blaske, Inc., 135 So. LaSalle Street, Chicago, Illinois, Phone: RAndolph 6-0466.

[fol. 91] Proof of Service (omitted in printing).

[fol. 94]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

[Title omitted]

ORDER EXTENDING TIME FOR FILING RECORD AND DOCKETING APPEAL—December 14, 1960

It appearing to the Court that counsel for the plaintiff-appellants herein are unable without undue hardship to prepare the Jurisdictional Statement to the Supreme Court within the time required by Rule 13 of the Rules of the Supreme Court, it is

Ordered that the time for filing the record and docketing the appeal with the Clerk of the Supreme Court of the United States is enlarged to January 20, 1961.

Dated this 14th day of December, 1960.

Randolph H. Weber, United States District Judge.

[fol. 99] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 100]

SUPREME COURT OF THE UNITED STATES

No. 667—October Term, 1960

A. L. MECHLING BARGE LINES, INC., et al., Appellants,

vs.

UNITED STATES et al.

ORDER POSTPONING JURISDICTION—April 3, 1961

Appeal from the United States District Court for the Eastern District of Missouri.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

April 3, 1961